No. 97-1249

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Supreme Court of the United States

October Term, 1997

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, UNITED ASSOCIATED OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, A.F.L.-C.I.O.,

Petitioner,

vs.

"AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL, INC.,

-and-

NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS "AUTOMATIC" SPRINKLER CORPORATION OF AMERICA AND FIGGIE INTERNATIONAL, INC.

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QUESTIONS PRESENTED

1. Whether, after bargaining for and agreeing to a provision in the collective bargaining agreement granting the company rights that directly and foreseeably conflict with certain NRLA rights, a company must yet again bargain with the same union when the company decides to exercise its rights in strict compliance with the already accepted terms.

2. Whether, under *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), including a clause in a collective bargaining agreement that specifically authorizes the subcontracting of work to other union contractors "clearly and unambiguously" waives, or otherwise prospectively discharges, the NLRA duty to negotiate concerning either the decision to subcontract or the ultimate effects of such subcontracting.

3. Whether, when a company decides to terminate its relationship with a union according to the terms set forth in the collective bargaining agreement and ceases hiring union workers, the company is subject to the same obligations to maintain the status quo and negotiate in good faith as if the agreement had simply lapsed.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

The following is the parent company of respondent "Automatic" Sprinkler Corporation Of America: Figgie International Inc. There are no nonwholly owned subsidiaries of respondent "Automatic" Sprinkler Corporation Of America.

There are no parent companies of respondent Figgie International Inc. The following is a nonwholly owned subsidiary of respondent Figgie International Inc.: Oden Corporation, incorporated in the State of New York.

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STATEMENT OF THE CASE

Respondents "Automatic" Sprinkler Corporation Of America ("'Automatic'") and Figgie International Inc. ("Figgie") (collectively, the "Company Respondents") concur with Petitioner's statement that since the early 1900's, "Automatic" has been in the business of installing, maintaining, and inspecting automatic fire protection systems. The Company Respondents also agree that during "Automatic's" long history, it has hired union labor and been party to various collective bargaining relationships with various local unions (collectively, "Local Unions") of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United State and Canada, AFL-CIO, ("Union"), including Union Local 669. Because of the long history between the Union, its locals, and "Automatic," by the early 1990's, the parties' respective bargaining agents were sophisticated, experienced representatives, each able negotiators, each capable of protecting the interests of their constituencies in the collective bargaining process.

As of 1992, "Automatic" employed well over 300 Union employees nationwide. All of the Union employees were covered by collective bargaining agreements negotiated by the employees' selected representatives. By 1992, clauses permitting "Automatic" to subcontract work had been negotiated into all but one of the collective bargaining agreements.[1] The Union

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1. The Petitioner attempts to characterize these subcontracting clauses as "traditional 'construction industry' subcontracting clauses" and attempts to excuse the Union's and their local's acquiescence to the terms because "experience" indicated that Automatic rarely invoked the subcontracting right. Pet. pp. 3-4. Whatever their reasons for agreeing to the clauses, the Petitioner does not and cannot contest their validity. Further, eleven of the (Cont'd)

was undoubtedly mindful that such clauses, without restrictions, could be used to move work from Union to non-union labor sources. Accordingly, the clauses permitted subcontracting only to contractors who were signatory to a collective bargaining agreement with the Local Unions.

As was their annual practice, in 1992 the management of "Automatic" and Figgie met and reviewed the long-term financial prospects for their companies. The companies operated according to five-year budget projection plans, referred to as "hardcore" plans. During these annual meetings it was the practice of management to review the past performance of each company against its hardcore plan and use the information gleaned to revise the forward-looking budget projections and modify that company's operating procedures.

"Automatic" was experiencing financial difficulties during the years leading up to the 1992 review. Pet. App. p. 3a. Accordingly, during that review, options for improving "Automatic's" financial performance were considered.

The Company Respondents agree with Petitioners that the major cost component of fire protection system work is the cost of labor. Pet. p. 3. Therefore, predictably, "Automatic's" management considered options for controlling or reducing their labor costs. "Automatic's" management also explored ways to improve the company's financial performance by increasing the company's sales. But, in order to improve sales, the company needed to penetrate new geographic market areas and new market segments, including non-union market areas and segments.

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twelve collective bargaining agreements with the Local Union contained subcontracting clauses. Pet App. pp. 3a. That a subcontracting clause was not included in all twelve agreements belies Petitioner's "industry standard" characterization.

Previously, "Automatic" had been unsuccessful penetrating non-union markets because of its relatively higher, Union-based labor costs.

"Automatic's" and Figgie's management settled upon a plan, termed the "Neutral Plan," as a means of combating "Automatic's" financial problems. Pet. App. p. 3a. The Neutral Plan contemplated "Automatic's" transformation from a combined sprinkler design and installation contractor to a design contractor utilizing subcontract labor for installation. By employing subcontract labor, "Automatic" expected to realize a number of immediate financial benefits.

> The Neutral Plan was expected to result in various benefits, including: gaining control of labor costs; elimination of negotiations with unions and the cost of grievances; minimization of excessive labor costs on some contracts; reduction of administrative labor costs and vehicle costs; elimination of road tool costs; ability to bid on both union and non-union projects; and entrance into the residential market.

Pet. App. p. 3a. The plan's adoption represented a fundamental change in "Automatic's" business.

In 1993, "Automatic" subcontracted more of its installation work. The work was subcontracted in accordance with the expressed terms of "Automatic's" existing collective bargaining agreements, and, in particular, the subcontracting clauses contained therein. "Automatic" subcontracted with contractors operating under their own collective bargaining agreements with the respective Local Unions. Pet. App. p. 3a. As more installation work was subcontracted, less such work was done "in-house." Consequently, over time, "Automatic" directly employed fewer and fewer Union workers. Eventually,

"Automatic" completely ceased employing Union workers. With no Union workforce, "Automatic" either allowed the now expiring collective bargaining agreements to lapse or terminated them outright.

The Petitioner characterizes "Automatic's" shift to subcontracting as the permanent discharge of more than 300 Union employees. Pet. p. 4. This description, while technically accurate in a very narrow sense, is a distortion of the real ***shift*** in employment that transpired. "Automatic" took surprising steps, far in excess of those required by the collective bargaining agreements, to facilitate the transference of their employees into the subcontracting workforce — and transfer they did.

> After termination of the various Local's contracts, a number of the [Automatic] employees who had lost their jobs with the implementation of the "Neutral Plan" became subcontractors to [Automatic] *with the aid of* [*Automatic*] including the use of vehicles and other equipment which the subcontractors bought or leased from [Automatic]. Some of [Automatic]'s new subcontractors undertook that role *at the suggestion and encouragement of* [*Automatic*] *officials* who were instructed to do so by their superiors. Many other employees became employees of subcontractors. *This is not surprising given the special expertise they possessed in sprinklerfitting.*

Pet. App. p. 79a. (Administrative Law Judge Findings of Fact adopted by the NLRB) (emphasis added).

Petitioner's description of "phase two" of the Neutral Plan is simply wrong. Petitioner suggests that once "Automatic" was free of the collective bargaining agreements and the Local Unions, it planned immediately and completely to cease

employing union workers in any capacity, including in its subcontracted work. Pet. p. 5. Petitioner's assertion is supported by neither the Sixth Circuit's nor the NLRB's opinions, and it is simply not true.

The Neutral Plan was intended to "position" "Automatic" "neutrally" in the workplace (neither union nor non-union) so that it could compete for both union and non-union projects.[2] Admittedly, "Automatic" sought the flexibility to compete in non-union markets using, if necessary, non-union workers once the collective bargaining agreements expired or were terminated. However, "Automatic" also sought to continue to operate in its traditional Union markets — using Union subcontractors — as well. In fact, the Sixth Circuit noted that "Automatic" continued to subcontract almost exclusively with Union contractors well after the collective bargaining agreements had expired or terminated.[3] Pet. App. p. 4a.

"Automatic" provided the Local Unions notices of its business changes throughout the Neutral Plan's implementation. On February 10, 1993, "Automatic" withdrew its membership in the National Fire Sprinkler Association ("NFSA"), the employer association tasked with Union negotiations. The next day, "Automatic" notified the Local Unions of the withdrawal. On May 26, 1993, "Automatic" gave Local 483 and Local 709 notice of the termination of their collective bargaining agreements effective August 1, 1993 and September 1, 1993, respectively. Pet. App. p. 3a. On January 28, 1994, "Automatic" notified the remaining Local Unions of its decision to discontinue directly hiring Union workers. Pet. App. p. 4a. Each of the

2. *See* Pet. App. pp. 44a-46a. ("Neutral Plan" description).

3. For "Automatic" to completely forego its traditional union markets, as Petitioners would have this Court believe was its plan, would be akin to committing economic suicide.

January 28 letters offered to negotiate with the respective Local Unions concerning the decision and its effects on the Union workers. Pet. App. pp. 48a-49a. Although the number and nature of the ensuing exchanges between "Automatic" and the Local Unions varied, the NLRB concluded that "Automatic" had refused to negotiate successor bargaining agreements with any of the Unions.[4] Pet. App. p. 4a.

In its Statement of the Case, Petitioner engages in a lengthy dissertation intermixing statements of facts with arguments at law concerning the Administrative Law Judge's conclusion, adopted by the NLRB, that "Automatic's" implementation of the Neutral Plan was motivated by anti-union animus in violation of § 8(a)(3) of the NLRA. Pet. pp. 5-9. On appeal, this conclusion was vigorously challenged by the Company Respondents as clearly erroneous. In its opinion, the Sixth Circuit strongly intimated its skepticism about the NLRB's conclusion.[5] However, the Sixth Circuit did not need to address

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4. On appeal, the Company Respondents vigorously challenged the NLRB's findings that Automatic refused to negotiate regarding the effects of the subcontracting and the resulting changes in its business as clearly erroneous. Because the Sixth Circuit concluded that Automatic had no duty to negotiate concerning the subcontracting, the Court did not address the propriety of the NLRB's conclusions concerning negotiations.

5. The relevant part of the opinion states:

> The [NLRB] in the present case found the benefits expected to result from the Neutral Plan — gaining control of labor costs, eliminating labor negotiations, eliminating costs associated with union grievances, and allowing Automatic to become competitive against non-union contractors — to be direct evidence that the [Company Respondents'] actions of subcontracting unit

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or resolve the issue because the Court instead concluded that, independent of the motivation behind implementing the Neutral Plan, "Automatic" had negotiated for and obtained the right to subcontract. So long as "Automatic's" actions with regard to the Neutral Plan's implementation conformed to the terms of the subcontracting rights previously negotiated, there was no violation of the National Labor Relations Act ("NLRA"). Pet. App. pp. 11a-15a.

REASONS FOR DENYING THE WRIT

The Petitioner struggles to fashion conflict and discord among the Circuits where none exists in a vain attempt to pique this Court's interest and obtain the desired writ. Petitioner begins the attempt by reviewing the history and arguing the importance of this Court's waiver doctrine decisions. Pet. pp. 13-16. Then, Petitioner claims conflict between the Sixth, Seventh and D.C. Circuits and the Tenth Circuit concerning whether an expressed contractual agreement between an employer and the employees' elected bargaining representative can be a "clear and unmistakable" waiver of an important NLRA right. Pet. pp. 16-21. Then, the Petitioner claims conflict between the Sixth Circuit and nearly every other Circuit over whether the standard for waiver should be a "clear and unmistakable" expression of that waiver or something different. Pet. pp. 21-25. Finally, as

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> work and discharging unit employees were motivated by anti-union animus. [Company Respondents] also expected the Neutral Plan to result in the reduction of vehicle costs, the elimination of road tool costs, and entrance into the residential market. Those are legitimate reasons for the decision to adopt the Plan as is the desire to fundamentally change the nature of Automatic's base of business from construction to service.

Pet. App. pp. 14a-15a.

an ancillary reason for granting the writ, Petitioner claims that the Sixth Circuit erred in distinguishing between contract "terminations" and "expirations" for purposes of imposing continuing duties owed to the Local Union. Pet. pp. 25-28. We will address each of these arguments in turn.

I.

THE SIXTH CIRCUIT'S DECISION IS COMPLETELY IN ACCORD WITH THIS COURT'S PRONOUNCEMENTS CONCERNING THE CONTRACTUAL WAIVER OF NRLA RIGHTS.

Framed properly, the issue over which Petitioner now claims conflict, is whether an expressed contractual provision contained in a collective bargaining agreement acts as a waiver of the union employees' right to bargain over important NRLA rights. This Court has repeatedly addressed this issue, and the Sixth Circuit has properly applied this Court's decisions on the matter.

The issue of contractual waiver was first considered by this Court in *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). In *Mastro*, the company asserted that a general "no-strike" clause in its collective bargaining agreement justified certain actions taken in response to an unfair labor practices strike. The company argued that the clause prohibited all strikes, even those over unfair labor practices.

The *Mastro* Court began its analysis noting:

> we assume that the employees, by *explicit contractual provision*, could have waived their right to strike against such unfair labor practices . . . the question[] before us [is] whether or not such a waiver was made by the [Union] in their 1949-1950 contract.

350 U.S. at 279 (emphasis added). However, the Court concluded that the contract clause relied upon by the Company was ineffective as a waiver. The *Mastro* Court reasoned that whether a particular clause constituted a waiver turned upon "the proper interpretation of the particular contract before us." *Id.* The contract clause relied upon by the Company made no specific reference to unfair labor practice strikes; it simply prohibited strikes, generally. The *Mastro* Court found this language insufficient reasoning that the employees' right to strike against unfair labor practices was so substantial that a "more compelling expression" of waiver was required to waive the right. *Id.* at 283.

This Court again considered the issue of contractual waiver squarely in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). The dispute in *Metropolitan Edison* likewise centered on a collective bargaining agreement; only this time a clause prohibiting unlawful work stoppages was at issue. *Id. at 695.* The company used the clause to justify imposing greater sanctions on union officials than on its other employees after such work stoppages. Twice, arbitrators upheld the disparate treatment of the union officials. When the union later filed an unfair labor practice charge, the company argued that the Union had waived its NRLA protections by failing to negotiate concerning the collective bargaining agreement clause in the face of the two adverse arbitration rulings.

The *Metropolitan Edison* Court, like the *Mastro* Court, reaffirmed that "a union may waive a member's statutorily protected rights."[6] *Id.* at 705. Further, the *Metropolitan Edison*

6. The *Metropolitan Edison* Court also reaffirmed this Court's earlier limitation on the authority of a union to waive certain statutory rights where the union's interest might diverge from that of the represented employees. For example, a union cannot bargain away (Cont'd)

Court adopted the *Mastro* Court's statement that a waiver could be "explicitly stated" in a collective bargaining agreement. *Id.* at 708. The *Metropolitan Edison* Court went on to say that an "explicitly stated" waiver is one that is clear and unmistakable:

> [W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is "explicitly stated." More succinctly, the waiver must be clear and unmistakable.

Id. The *Metropolitan Edison* Court formulated the "clear and unmistakable" standard for waiver of statutorily protected rights in the context of evaluating a general contractual provision. Thus, traced back to its roots, the "clear and unmistakable" standard has its genesis in a review of the effect of a contractual provision.

The Sixth Circuit's post-*Metropolitan Edison* decisions — including the decision in the instant case — have exhibited nothing but fidelity to the "clear and unmistakable" waiver standard announced in that case. The Sixth Circuit first recognized the "clear and unmistakable" waiver standard in *Local Union 1392, Intern. Bro. Of Elec. Workers v. NLRB*, 786 F.2d 733 (6th Cir. 1986). In that case, the court reviewed the language of a collective bargaining agreement regarding whether the union had waived its officials' statutory right to be free from selective discipline stemming from unauthorized work stoppages. *Id.* at 734. The court, citing to *Metropolitan Edison*,

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important § 7 rights where the waiver might entrench that union as the employees' representative and inhibit another union from successfully communicating with the employees or otherwise challenging the current union's representation. *See NLRB v. Magnavox Co. of Tenn.*, 415 U.S. 322 (1974).

found that the contractual language was sufficient to establish a waiver. *Id.* at 735.

Thereafter, the Sixth Circuit revisited the issue of a contractual waiver in *Litton Microwave Cooking Products v. NLRB*, 868 F.2d 854 (6th Cir. 1989). In that case, the court considered whether the collective bargaining agreement's management rights clause granted the employer the right to transfer production to other facilities without bargaining about the relocation. *Id.* at 855. Specifically, the court reviewed the Board's prior determination that the management rights clause did not grant the employer the right to relocate production in "clear and unmistakable" language. *Id.* at 858. Citing to *Metropolitan Edison*, and noting "the explicit reference to layoffs and production methods in the management rights clause," the court rejected the Board's finding as not supported by substantial evidence. *Id. See also East Tennessee Baptist Hosp. v. NLRB*, 6 F.3d 1139, 1144 (6th Cir. 1993) (no "clear and unmistakable" waiver where contract is silent on issue); *NLRB v. Mead Corp.*, 73 F.3d 74, 79 (6th Cir. 1996) (no "clear and unmistakable" waiver absent contract language specifically addressing the purportedly waived right); *Uforma/Shelby Business Forms, Inc. v. NLRB*, 111 F.3d 1284, 1289 (6th Cir. 1997) (citing to *Metropolitan Edison*, court found that collective bargaining agreement granted employer the right to eliminate its third shift without prior notice or bargaining).

In the instant case, the Sixth Circuit found that the Company Respondents had no duty to bargain over the subcontracting, in that "Petitioners and the unions bargained over the subject of subcontracting and they memorialized that bargain in their respective collective bargaining agreements." Pet. App. p. 7a. By so finding, the court below did not, as claimed by Petitioner, reject or otherwise deviate from the "clear and unmistakable" waiver standard articulated by *Metropolitan Edison*.

In evaluating the Company Respondents' contractual right to subcontract, the court below relied on its analysis of a contractual waiver claim in *Gratiot Community Hosp. v. NLRB*, 51 F.3d 1255 (6th Cir. 1995). In *Gratiot*, the employer negotiated a special "7/70" staffing program for its employees with the union. Pursuant to the terms of the collective bargaining agreement, the employer retained the authority to "decide the number of assignments and the work areas" under the program. *Id.* at 1258. When the hospital discontinued the program, the union sought to negotiate. The hospital refused, asserting that the terms of the collective bargaining agreement permitted the hospital to reduce the number of teams assigned under the program including reducing the number to zero. *Id.* Applying principles of the "clear and unmistakable" waiver standard, the Sixth Circuit found:

> [T]he language of [the 7/70 clause] is *clear* and *unambiguous* in granting the authority to the Hospital to determine the number of shifts, including zero, in the 7/70 program. Consequently, the Hospital's actions with respect to the 7/70 program were not in violation of the [NLRA].

Id. at 1261 (emphasis added). The Sixth Circuit also reasoned in *Gratiot* that:

> [W]hen an employer and union bargain about a subject and memorialize that bargain in a collective bargaining agreement, they create a set of rules that govern their future relations. Unless the parties agree otherwise, there is no continuous duty to bargain with respect to a matter covered by the contract.

Id.

In the instant appeal, the Sixth Circuit concluded, rightly, that the Union had waived its right to negotiate over subcontracting. The Sixth Circuit found that "Automatic" and the Local Unions had bargained over subcontracting.

> Here, [Company Respondents] and the unions bargained over the subject of subcontracting and they memorialized that bargain in their respective collective bargaining agreements. This bargain permitted [Company Respondents] to contract out work as long as it was to a contractor who had a collective bargaining agreement with the local union. Because the collective bargaining agreements contain no language providing for subsequent bargaining during the term of the agreements with respect to the subcontracting of work, the [NLRB] has no authority to compel [Company Respondents] to bargain with the unions over that subject.

Pet. App. p. 7a. With the subcontracting right secured in the collective bargaining process, the Sixth Circuit concluded that, like in *Gratiot Community Hosp.*, the bargained for right waived the Local Unions' NLRA rights.

> [In *Gratiot Community Hosp.*], we found that the actions by the hospital did not violate the [NLRA] because the language in the collective bargaining agreement *clearly* and *unambiguously* granted the hospital the authority to determine the number of shifts, including zero, in the 7/70 program.
>
> Similarly, the language in the collective bargaining agreements in the present case *unambiguously* granted [Company Respondents] the authority to subcontract work, without limitation,

> provided it was to contractors that had agreements with the unions.

Pet. App. p. 8a (emphasis added). Consequently, the Sixth Circuit ruled that the Local Unions were estopped from asserting NRLA violations based upon "Automatic's" subcontracting and implementation of the Neutral Plan. Pet App. pp. 7a, 9a, 14a-15a.

Contrary to Petitioner's claim that the instant case marks the Sixth Circuit's rejection of *Metropolitan Edison*, *see* Pet. p. 23, this case is completely in keeping with this Court's waiver doctrine as announced in both *Mastro* and *Metropolitan Edison*.[7] *Metropolitan Edison* mandates a review of a general contractual provision to determine whether there is a clear and unmistakable waiver of a statutorily protected right. *Metropolitan Edison*, 460 U.S. at 708. In the instant case, the Sixth Circuit did precisely that. While the court below may not have delineated to Petitioner's satisfaction the "clear and unmistakable waiver" phraseology embodied in *Metropolitan Edison*, the court clearly evaluated the language of the collective bargaining agreement to arrive at the conclusion that the Company Respondents had no duty to bargain over the subcontracting decision. Accordingly, the Sixth Circuit's decision does not mark a rejection of the principles of *Metropolitan Edison*.

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7. The Seventh and D.C. Circuits have also considered the issue of expressed contractual waivers of NLRA rights. *See Conoco Inc. v. NLRB*, 91 F.3d 1523 (7th Cir. 1996); *Dep't of Navy v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992).

II.

THE SIXTH CIRCUIT'S DECISION HERE DOES NOT CONFLICT WITH THE TENTH CIRCUIT'S DECISION IN *CAPITOL STEEL & IRON CO. v. NLRB*, 89 F.3d 692 (10th Cir. 1996).

First, the Tenth Circuit's decision in *Capitol Steel* is both factually and legally distinguishable from the Sixth Circuit's decision in the instant case. Second, the Tenth Circuit's decision is completely reconcilable with the Sixth Circuit's decision and with this Court's pronouncements in *Mastro* and *Metropolitan Edison*.

In *Capitol Steel*, the management of a company embroiled in the collective bargaining process attempted to use a right granted under the collective bargaining agreement to improperly influence the collective bargaining process in an unforeseen and unforeseeable manner. The employer and union were engaged in negotiating a new collective bargaining agreement. Under the old agreement, the employer had the right to " 'pay wages in excess of the minimum requirements . . . to one or more employees in different amounts to different employees.' " *Id.* at 693 (citing the NLRB opinion). As negotiations towards a new agreement were coming to a close, the employer attempted to improperly influence the Union and its membership by selectively and overtly giving out raises to certain employees.[8]

8. For example, raise notices were distributed to select union members as they left the plant to attend a post-negotiation union meeting. *Id.* at 694. Also, a company officer "appeared" at a union meeting to distribute two more raise notifications to members of the union's negotiating committee. The Tenth Circuit found that the raises were intended to influence the collective bargaining process. The company's president "testified that these raises were given to reward employee performance, and to convince the employees 'to

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> Spurred by the appearance of a company representative at the Union meeting, by the Company's attempt to influence voting by its distribution of raises just before and during the meeting, and by its failure to supply specific information on the raises, the group voted to strike.

Id. The company thereafter refused to negotiate on wages and began hiring replacement workers. The union, in turn, filed unfair labor practice charges, and the Board found that the company's conduct violated §§ 8(a)(1) and 8(a)(5) of the NLRA. *Id.* at 695.

On review, the company claimed that it had exercised its valid contractual right to increase or decrease individual employee's wages whenever and however it chose. *Id.* at 696. Paying homage to *Metropolitan Edison*'s "clear and unmistakable" waiver language, the Tenth Circuit affirmed the Board's finding of § 8(a)(1) and § 8(a)(5) violations. *Id.* at 697. In so finding, the court noted that the timing and manner of the raises violated the company's duty to bargain, despite any waiver. *Id.* Indeed,

> when the Company undermined the union's role as the employees' sole bargaining agent by raising wages in a manner engineered to influence employees to vote in its favor at a key moment in the bargaining process, it improperly exploited that waiver and violated §§ 8(a)(5) and (1) of the NLRA.

Id.

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be on our side' as they went to the Union meeting to vote on the Company's proposal." *Id.* And, the Court concluded that the notices were distributed in a manner "calculated to sow dissension and demean the role of the Union." *Id.* at 697.

As an initial matter, *Capitol Steel* is legally inapposite to the instant case. Unlike the instant case, in which Petitioner claims that the Sixth Circuit's decision rides roughshod over employees' § 8(a)(3) right "to form, join and bargain collectively through their chosen representative free of employer anti-union retaliation," Pet. p. 11, the *Capitol Steel* case involved no allegation or finding of unlawful employer discrimination in violation of § 8(a)(3). Thus, *Capitol Steel* cannot be read as prohibiting waiver of employees' rights under § 8(a)(3) of the NLRA.

The *Capitol Steel* decision is also factually distinguishable from the instant case. In *Capitol Steel*, unlike the instant case, the collectively-bargained right did not directly and foreseeably implicate the NLRA rights that were later violated. As discussed above, under *Mastro* and *Metropolitan Edison*, a right granted in a collective bargaining agreement may effectively waive a NLRA right, provided that the waiver is "clear and unmistakable." It stands to reason that a clear conflict must exist between the bargained-for right and the NLRA statutory right claimed to have been waived before the necessary "clear and unmistakable" waiver can exist.

In *Capitol Steel*, the company's management attempted to use the bargained-for right in a completely unpredictable and unanticipated way. There, the company tried improperly to influence employee votes on the company's best and final contract offer, at the very hour the vote was being taken, and in the process, sought to undermine the union's leaders. *Id.* at 697. That the company's management would turn such a benign right into such a powerful weapon could not have been predicted. Accordingly, the union's agreement to the employer's right to grant individual raises cannot be reasonably interpreted as a waiver of the NLRA rights claimed.

In the instant case, the facts surrounding the Company Respondents' decision to subcontract do not approach the abuse of a contractual right found in *Capitol Steel*. Far from undermining the union by distributing pay raises to union leaders at the time and place when employees were voting on a contract proposal, the Company Respondents simply subcontracted work, far removed in time and place from the crucible of employee decision-making present in *Capitol Steel*. Indeed, far from undermining the union, as was the case in *Capitol Steel*, the Company Respondents' subcontracting resulted in the overwhelming amount of the work being subcontracted to union signatory companies. Moreover, unlike in *Capitol Steel*, the Sixth Circuit here concluded that the Local Unions, by consenting to the subcontracting clause with restriction only on **who** could be awarded subcontracted work, and not on **the amount of work** that could be subcontracted, had prospectively agreed to "Automatic's" plan to subcontract all its work. That "Automatic" might use the subcontracting right to do exactly what it did under the Neutral Plan was eminently predictable and foreseeable. It was so foreseeable, in fact, that the Local Unions sought to regulate the right by restricting "Automatic" to subcontracting with Local Unions, a restriction that "Automatic" scrupulously honored, to the tune of subcontracting 96.89 percent of the work to union subcontractors. *See Calatrello v. "Automatic" Sprinkler Corporation of America and Figgie International, Inc.*, 55 F.3d 208, 211 (6th Cir. 1995); *see also* Pet. App. p. 9a, n. 2. Thus, *Capitol Steel* is inapposite to the instant case, and therefore forms no basis for any finding of a conflict between the Sixth and Tenth Circuits.

III.

THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THE FIRST, SECOND, THIRD, FOURTH, FIFTH, EIGHT, NINTH AND TENTH CIRCUITS REGARDING THE APPLICATION OF THE *METROPOLITAN EDISON* "CLEAR AND UNMISTAKABLE" WAIVER STANDARD.

Petitioner asserts that the Sixth Circuit has adopted some standard other than the "clear and unmistakable" standard to find a waiver of an important NLRA right. We simply note, as was discussed in detail above, that the Sixth Circuit's decision is completely in keeping with the "clear and unmistakable" standard. Thus, Petitioner's claimed broader conflict is more contrived than real.[9]

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9. Further, all of the Circuit Court decisions cited by Petitioner are either factually distinct or easily reconcilable with the Sixth Circuit's decision here. Of the eight Circuit Court decisions that the Petitioner cites as in conflict, six do not address specific contractual waiver as an issue at all. Instead they addressed whether a waiver could be *implied* because of certain acts. *See NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030 (10th Cir. 1996); *Porta-King Bldg. Systems v. NLRB*, 14 F.3d 1258 (8th Cir. 1994); *NLRB v. Litton Fin. Printing Div.*, 893 F.2d 1128 n.6 (9th Cir. 1990), *rev'd in part*, 501 U.S. 190 (1991); *Communication Workers of America v. NLRB*, 644 F.2d 923 (1st Cir. 1981); *Florida Steel Corp. v. NLRB*, 601 F.2d 125 (4th Cir. 1979); *Radio Television Technical School Inc. v. NLRB*, 488 F.2d 457 (3d Cir. 1973). Of the two decisions that tangentially addressed the issue of contractual waiver, one reaches the unremarkable conclusion that a general contract clause controlling access to employee records does not waive the union's right to access employee records in the grievance process. *See NLRB v. New York Telephone Co.*, 930 F.2d 1009 (2d Cir. 1991). In the remaining decision, the Fifth Circuit reached the equally unremarkable conclusion that a contract clause did not waive an important judicially determined right because the

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IV.

PETITIONER'S RELIANCE ON THE SECTION 8(d) "CONTRACT TERMINATION" RULING IS A RED HERRING.

First, Petitioner's sole argument here is that the case below was wrongly decided; Petitioner makes no claim of conflict. Second, whether rightly or wrongly decided, this issue is irrelevant to the Sixth Circuit's central holding and is largely immaterial to the resolution of the matter.

The dispute here centers on whether "Automatic" had a duty to negotiate in good faith and to maintain the status quo following the termination of certain of the collective bargaining agreements. The Sixth Circuit concluded that there was no such duty. Pet. App. p. 11a. The Sixth Circuit concluded that the act of terminating a collective bargaining agreement is fundamentally different than merely allowing one to lapse. Termination suggests the severing of a relationship and not merely the failure to reach new terms. Since the NLRA cannot force an employer to hire union labor when it has decided to do otherwise, it seems reasonable that once an organization decides to terminate its collective bargaining agreement, it is free to change the status quo and refuse to negotiate with the union. Pet. App. p. 11a. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

However, in the context of this case, the Sixth Circuit's decision is largely irrelevant. The Court's conclusion that the

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clause's negotiation predated judicial recognition of that right and because the parties had not focused on the right at the time of the negotiations. *Prudential Ins. Co. v. NLRB*, 661 F.2d 398 (5th Cir. Nov. 1981).

Company Respondents had an absolute right to subcontract their union work — including all their work — renders this issue a legal curiosity, nothing more. At the time that "Automatic" terminated its collective bargaining agreements with the various affected Local Unions, it had already fully subcontracted its union work and discontinued hiring union labor. So, even assuming the Sixth Circuit decided the issue wrongly, it is a distinction without a difference. What would it mean to "Automatic" to require it to maintain the status quo? "Automatic" would still be permitted to subcontract all of its work. Accordingly, "Automatic" would still not hire labor directly. Without a direct workforce, a collective bargaining agreement serves little meaningful purpose.

CONCLUSION

For the aforementioned reasons, Respondents "Automatic" Sprinkler Corporation of America and Figgie International Inc. respectfully urge this Court to deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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